

In the Matter of the Compensation of
PHILIP A. CASE II, Claimant
Own Motion No. 22-00027OM
INTERIM OWN MOTION ORDER REFERRING FOR A FACT FINDING
HEARING

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Reviewing Panel: Members Ceja and Ogawa.

Claimant requests Own Motion relief, seeking reopening of his “worsened condition” claim for conditions previously accepted by the self-insured employer (left shoulder strain, left shoulder labral tear, and left biceps tendonitis). The employer opposes claimant’s request, contending that he was not in the work force at the time of disability. Because it is unclear when claimant’s aggravation claim was filed, we refer this matter to the Hearings Division for a fact finding hearing.

FINDINGS OF FACT

On November 25, 2016, claimant sustained a compensable left shoulder injury. (Ex. 1). The employer accepted a left shoulder strain. (Ex. 2).

On June 8, 2017, a Notice of Closure did not award permanent disability benefits. (Ex. 4). The Notice of Closure stated that claimant’s “aggravation” rights would end on June 8, 2022. (*Id.*)

In February 2019, the employer accepted a left labral tear and left biceps tendonitis. (Ex. 9).

After two Notices of Closure (in January and August 2021) were rescinded, a February 9, 2022, Notice of Closure awarded 22 percent whole person permanent impairment. (Exs. 17, 24, 29).

On May 16, 2022, claimant was evaluated by his attending physician, Dr. Lamprecht, for worsening left shoulder symptoms including numbness and tingling. (Ex. 31). Based on claimant’s symptoms and progressive degenerative changes shown on x-ray, Dr. Lamprecht recommended a left shoulder total arthroplasty. (*Id.*) Claimant and Dr. Lamprecht completed an 827 form initiating his “aggravation” claim. (Ex. 30). Dr. Lamprecht noted that claimant’s “[w]ork ability status” was “[m]odified work.” (*Id.*)

In September 2022, Dr. Bremner, an orthopedic surgeon who evaluated claimant at the employer's request, stated that claimant had preexisting arthritis in the left shoulder that combined with the accepted conditions from the 2016 work injury to cause and prolong claimant's disability and need for medical treatment. (Ex. 36-2). He noted that he was unable to isolate either the preexisting arthritis or the accepted conditions as the major contributing cause of claimant's current left shoulder condition, disability, and need for a left shoulder arthroplasty. (*Id.*)

In November 2022, claimant requested Own Motion relief, contending that the employer had not processed an Own Motion claim. In response, the employer asserted that claimant was not in the work force.

CONCLUSIONS OF LAW AND OPINION

When a claim for a worsening of a previously accepted condition is filed before the expiration of a claimant's five-year "aggravation rights," the claim must be processed under ORS 656.273. ORS 656.273(4); *Von D. Bailey*, 55 Van Natta 417, 421, *recons*, 55 Van Natta 851 (2003).

Here, the first claim closure was on June 8, 2017. (Ex. 4). Therefore, claimant's aggravation rights expired on June 8, 2022. ORS 656.273(4)(a).

The record indicates that on May 16, 2022, claimant and his attending physician, Dr. Lamprecht, completed an 827 form initiating an "aggravation" claim.¹ (Exs. 30, 31). Yet, for reasons that are unclear in this currently developed record, it appears that the employer may not have received this form until July 6, 2022. (Ex. 34).

Because claimant's five-year "aggravation rights" expired on June 8, 2022, it is necessary to determine whether the "aggravation" claim was filed before that date, and whether the claim must be processed under ORS 656.273(1), rather than ORS 656.278.² Because it is unclear when the "aggravation" claim was filed, we conclude that it is appropriate to refer this matter to the Hearings Division for a hearing. In this way, the record may be further developed and the parties may have

¹ The record does not indicate when, and by what means, the form was distributed to the employer.

² If the claim was perfected after the expiration of claimant's five-year "aggravation rights," the employer must submit an Own Motion recommendation concerning claimant's "worsened condition" claim. See OAR 438-012-0020(3); OAR 438-012-0030(1)(b).

an opportunity to present their respective positions concerning this matter to the ALJ. Considering the insufficiency of this record, and the procedural posture of this particular claim, we conclude that such a procedure would best serve the interests of the parties and administrative economy. *Johnathan M. Myers*, 63 Van Natta 2086, 2087 (2011); *David J. Albano*, 55 Van Natta 1361 (2003).

In submitting their respective positions to the ALJ, the parties are requested to address the effect, if any, the following points and authorities may have on this matter: ORS 656.273(2), (3); *Barr v. EBI Cos.*, 88 Or App 132 (1987); *Dan A. Lundquist*, 74 Van Natta 581; *Bailey*, 55 Van Natta at 425-26; *David L Dylan*, 50 Van Natta 276 (1998).

Accordingly, this matter is referred to the Hearings Division for action consistent with this order. The assigned ALJ is directed to forward to the Board an unappealable recommendation. In that recommendation, the ALJ shall make findings of fact and conclusions of law regarding the jurisdiction issue (*i.e.*, how and when claimant's "aggravation" claim was perfected).³ After issuance of the recommendation and order, the parties should advise the Board of their respective positions regarding the ALJ's Own Motion Recommendation.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 14, 2023

³ If a hearing request is subsequently filed, which raises issues regarding "non-Own Motion related" issues, the ALJ may proceed with a consolidated hearing under OAR 438-006-0065. In that situation, in addition to an Own Motion Recommendation, the ALJ shall also issue a final, appealable order regarding the "non-Own Motion related" issues.